In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1483

DOUGLAS FREDERICK HELLWIG AND JOHN EDWARD WILLIAMS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1973. A petition for rehearing was denied on April 2, 1973. The petition for a writ of certiorari was filed on May 2, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether customs officers complied with the Fourth Amendment in conducting a warrantless search of a vehicle in which they found 845 pounds of marijuana.

STATEMENT

After a jury-waived trial in the United States District Court for the Southern District of California, petitioners were convicted of having conspired to possess with intent to distribute and having possessed with intent to distribute 845 pounds of marijuana in violation of 21 U.S.C. 841(a)(1) and 846. Petitioner Hellwig was sentenced to three years' imprisonment and petitioner Williams was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App.).

At a pre-trial suppression hearing, the parties stipulated that if the government's witnesses were called, their testimony would accord with the facts set forth in an affidavit prepared by the government. That affidavit, which constituted the record before the court on the legality of the search in question, provides in its entirety as follows (Pet. 5-7):

> On September 8, 1971, Captain Richard Ramirez of the Imperial County Sheriff's Department advised Customs Senior Resident David F. Burnett that there were three persons, two of which were later identified as John Edward Williams and Douglas Frederick Hellwig, who were staying at Room 7 of the [El Dorado] Motel in El Centro, California. Williams and Hellwig had been using a 1970 Pontiac Bonneville bearing California license 195 ECI. Investigation by Captain Ramirez revealed that the vehicle was registered to Michael Scott Adams, who had been arrested in Santa Cruz County, California, on July 7, 1971, when he was found in possession of 235 kilos of marijuana.
>
> Surveillance of the room and vehicle were set up at approximately 6:00 p.m. Williams and Hellwig

left El Centro, California, in the 1970 Pontiac with Williams as the driver and Hellwig as passenger. They arrived at Calexico, California, and parked at the 200 block of Second Street, several hundred yards north of the international border. Hellwig alighted from the vehicle and entered Mexico afoot where he was observed walking to a taco stand adjacent to a parking lot. He stayed there briefly and returned back across the border into Calexico and entered the 1970 Pontiac driven by Williams. The two defendants drove around Calexico for approximately 15 minutes and parked at the Fed Mart parking lot in Calexico.

Hellwig then left the 1970 Pontiac and entered the Fed Mart store and after a few minutes returned from the store and entered a 1965 Pontiac Bonneville bearing California license NMU 599. This car was dusty as if it had been taken cross country and seemed to be very heavily loaded in the rear. Hellwig, with Williams following, then drove back to El Centro, California, and parked at the [El Dorado] Motel and entered Room 7.

Based upon the above information and his previous experience with smuggling operations, Agent Fernandez believed that Hellwig had crossed the border to meet his contact, to pay for the marijuana and have the load car's location outlined to him. When Hellwig returned to the Fed Mart lot, a common drop-off point for load vehicles, his suspicions were confirmed, especially in light of the appearance of the vehicle.

Continuous surveillance was set up throughout the night and at 6:15 a.m. Hellwig left Room 7 and was followed out shortly thereafter by

Williams. Hellwig entered the 1965 Pontiac and Williams entered the 1970 Pontiac and they began to drive south on Imperial Avenue in El Centro, California, traveling closely together. Both vehicles entered Interstate 8 and headed west where they were stopped approximately seven miles from El Centro.

A search of the 1965 Pontiac revealed 382 kilo packages of marijuana in the trunk compartment.

Hellwig and Williams were placed under arrest, advised of their rights and elected to remain silent. However, while Hellwig was being transported to the Imperial County Jail he made a spontaneous statement saying, "I shouldn't have picked up that load."

Upon arriving at the Imperial County Jail defendants were searched and Hellwig was found to be in possession of $1595 and Williams was in possession of $348.02.

Following the suppression hearing, the trial court sustained the search of the 1965 Pontiac on the basis of principles regarding "border searches." At the trial, testimony of government witnesses corroborated the facts contained in the affidavit introduced at the suppression hearing. On appeal the court of appeals found that the search could not be sustained as a border search but rather that it was valid as based on probable cause (Pet. App.).

ARGUMENT

1. As held by the court of appeals (Pet. App. 2), "the facts, to an experienced border agent familiar with the methods adopted by smugglers, established

probable cause to believe that the car contained seizable contraband."

Customs officers are authorized to make arrests for narcotics or marijuana violations where they have reasonable grounds to believe that the person to be arrested has committed or is committing such violations. 26 U.S.C. 7607. In the instant case, the customs officers, who searched the 1965 Pontiac driven by petitioner Hellwig, possessed the following facts:

1. The registered owner of the 1970 Pontiac, in which petitioners had arrived in El Centro and which petitioner Williams was driving at the time of petitioner's arrest, had been arrested in Santa Cruz County, California, two months prior to that time for possession of 235 kilos of marijuana.

2. On the evening of July 7, 1971, petitioners left their motel room in El Centro and drove to Calexico, where they parked a few hundred yards from the Mexican border. Petitioner Hellwig walked across the border to a taco stand and almost immediately walked back into Calexico, where he rejoined petitioner Williams in the 1970 Pontiac. Petitioners then proceeded to the Fed Mart parking lot in Calexico.

3. The Fed Mart parking lot in Calexico is a common drop-off point for cars containing loads of contraband.

4. The 1965 Pontiac, which petitioner Hellwig picked up at the Fed Mart parking lot, was dusty and seemed to be very heavily loaded in the rear.

5. Petitioners drove the two cars from the Fed Mart parking lot back to their El Centro motel. Early the next morning, petitioners, following one another, drove the two cars away from the area.

Under these circumstances, which "painted a clear picture to the experienced border agent" (Pet. App. 2), a man of reasonable caution would believe that the 1965 Pontiac contained contraband. The subsequent search of the vehicle as it departed the scene was therefore reasonable even without a warrant. *Chambers* v. *Maroney*, 399 U.S. 42; *Carroll* v. *United States*, 267 U.S. 132; *United States* v. *Vigil*, 448 F. 2d 1250 (C.A. 9). Nothing in *Coolidge* v. *New Hampshire*, 403 U.S. 443, cited by petitioners, suggests a different result since *Coolidge* did not involve a search by customs officers, did not involve a search for contraband, or involve a search on the open highway.

2. Petitioners argue that "the appellate court opinion totally misapprehends the law regarding the relative standards applicable to the alternative theories of or probable cause and 'border searches'" (Pet. 13). Petitioners base their argument on the following paragraph from the opinion of the court below (Pet. App. 1-2):

> We agree with appellants that the search here in question cannot be justified as a border search. Such a search is not authorized by the suspected presence of contraband but rather because the contents, whatever they may be, have crossed the border without having been subjected to inspection. Reasonable certainty (a higher standard than probable cause) that such is the case is necessary. That certainty is lacking here.

Contrary to petitioners' contention (Pet. 13), the court below did not state that probable cause is a less exacting standard than that required to sustain a border search. Under the "border search" doctrine as applied by the Ninth Circuit, a search of a vehicle can be conducted without probable cause to believe contraband is present

if it is reasonably certain that whatever is present has come across the border without being inspected. In the present case, the court of appeals stated that it believed the customs officers in the instant case lacked reasonable certainty that the contents in the 1965 Pontiac had crossed the border and thus there was no basis for terming the case a "border search." But the court concluded that the stipulated facts showed that the customs officers had probable cause to believe the car was carrying contraband, and thus under general Fourth Amendment principles they were entitled to stop and search the car immediately. That conclusion is sound. See *Chambers* v. *Maroney*, 399 U.S. 42; *United States* v. *Vigil*, 448 F. 2d 1250 (C.A. 9); *United States* v. *Markham*, 440 F. 2d 1119 (C.A. 9); *United States* v. *Weil*, 432 F. 2d 1320 (C.A. 9), certiorari denied, 401 U.S. 947.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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